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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc. FILE No. _____

Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth To Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers

EMERGENCY REQUEST
FOR DECLARATORY RULING

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Introduction and Summary

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Commission issue an expedited declaratory ruling to provide relief from a series of state commission decisions that are directly contrary to the *Triennial Review Order*,[1] as well as other sources of federal law. Those rulings are currently forcing BellSouth to provide service in a manner that this Commission has expressly decided should not be required, and, equally important, discourages competitors from investing in broadband facilities. A prompt decision by this Commission is urgently needed to vindicate the Commission's national broadband and competition policies. An expedited decision is equally necessary to enforce Congress's express determination "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *petitions for mandamus and review pending, United States Telecom Ass'n v. FCC*, Nos. 00-1012, 00-1015, 03-1310 *et al.* (D.C. Cir.).

The issue presented here arises because some state commissions – including those in Florida, Kentucky, Louisiana, and most recently Georgia – have begun telling BellSouth to whom it must provide its broadband services, at what price, and on what terms and conditions. In direct contravention of this Commission's unanimous judgment in the *Triennial Review Order*, these state commissions have required BellSouth to provide either its wholesale broadband transmission or its retail broadband Internet access service over UNE loops leased by CLECs (either on a stand-alone basis or as part of the UNE platform ("UNE-P")).[2] In some instances, moreover, the states have specified that BellSouth may not alter the price it charges for its broadband service in such circumstances and must meet other required terms and conditions (such as a "seamless" transition).

These decisions violate the *Triennial Review Order*, which expressly holds that ILECs need not provide data services on CLEC UNE voice lines, *see* 18 FCC Rcd at 17141, ¶ 270, and they are contrary to Congress's policy of maintaining a "vibrant and competitive" market for Internet services "unfettered by . . . State regulation." Moreover, state-level regulation of broadband Internet access services creates a patchwork of regulatory burdens that is fundamentally inconsistent with the Internet and will work to prevent the Commission's development of the single national framework necessary to preserve the "vibrant and competitive" market that presently exists for the Internet.

Indeed, the uncertainty and inconsistency that arise from state regulation of interstate information services will inevitably diminish facilities-based broadband competition. If CLECs can force an ILEC to continue offering broadband services to the

[2] BellSouth's retail broadband Internet access service is marketed as BellSouth FastAccess® ("FastAccess").

CLECs' voice customers, their incentive to develop independent broadband capabilities and to invest in new and innovative broadband facilities is decreased. By the same token, such forced sharing deprives ILECs of the benefit of their investment in DSL deployment. Accordingly, these state decisions undermine incentives for investment and innovation in broadband, in direct conflict with one of Congress's and this Commission's urgent policy priorities.

As a legal matter, these state decisions violate this Commission's rules and orders for at least three independent reasons:

First, as noted, in the recent *Triennial Review Order*, the Commission held that incumbents are not required to provide broadband services over the same UNE loops that CLECs use to provide voice services. *See* 18 FCC Rcd at 17141, ¶ 270. The Commission explained that, because voice CLECs can either provide voice and data services to their customers or engage in line splitting with other CLECs, incumbents should not be forced to provide broadband services to CLEC UNE voice customers. *See id.* Indeed, the Commission concluded, such obligations would be contrary to the core congressional policy of encouraging investment and innovation in broadband. *See id.* ¶ 261. The *Triennial Review Order* further establishes that, where, as here, the Commission has found "no impairment," state commission decisions imposing the same obligation rejected by the Commission will almost invariably be preempted under 47 U.S.C. § 251(d)(3). *See id.* at 17101, ¶ 195.

The *Triennial Review Order*, moreover, invited parties to file petitions for declaratory ruling to address such improper state decisions. *See id.* BellSouth files this

Petition in response to that explicit invitation, and urgently requests that the Commission take action to nullify these unlawful decisions.

Second, and independent of this Commission's holding in the *Triennial Review Order*, for decades this Commission's *Computer Inquiry* decisions have established that interstate information services should remain free of public-utility regulation. State commission decisions that purport to regulate BellSouth's FastAccess service – that is, its retail DSL-based Internet access service – crash head-on into that federal policy. FastAccess is an unregulated interstate "information service" over which the Commission has previously preempted state regulation. By purporting to tell BellSouth to whom it must offer this service – and, moreover, specifying conditions for price and other terms of service – state commissions violate those established prohibitions.

Third, federal law is clear that state agencies generally lack authority to regulate interstate telecommunications services; that is particularly the case as to services offered under a federal tariff filed with this Commission.[3] BellSouth's wholesale DSL transmission service is provided under such an interstate tariff, and thus it is subject to the exclusive jurisdiction of this Commission. State commission decisions that purport to interpret that tariff or that impose terms and conditions on that service either by itself or as a component of BellSouth's FastAccess service are thus unlawful.[4]

Accordingly, in response to this Petition, the Commission should declare that:

1. Under the *Triennial Review Order* and other Commission determinations, state commissions are preempted under 47 U.S.C. § 251(d)(3), as well as other

[3] *See infra* notes 26-28.

[4] *See* discussion *infra* pp. 26-30.

statutory provisions, from requiring that BellSouth provide DSL-based services to CLEC UNE voice customers.

2. This Commission's determinations that interstate information services should remain free of regulation preempt state commission attempts to require BellSouth to provide DSL-based Internet access to CLEC UNE voice customers.

3. This Commission's exclusive jurisdiction over interstate telecommunications preempts state commission decisions purporting to govern the terms under which BellSouth provides its federally tariffed wholesale DSL transmission either by itself or as a component of BellSouth's DSL-based Internet access service.

Given the vital importance of these issues to broadband competition and the Commission's policies, the Commission should resolve these issues with the greatest possible dispatch.

Background

This Petition involves a recurring issue as to which a Commission decision declaring the law is urgently needed to resolve uncertainty and to ensure uniform treatment of broadband Internet access services.

In BellSouth's region alone, six state commissions have addressed the question of whether BellSouth must continue to provide broadband Internet access service over UNE facilities. In accord with this Commission's judgments, the South Carolina and North

Carolina commissions have determined that it would be improper to impose any such requirements.[5]

By contrast, four other state commissions – those in Florida, Georgia, Louisiana, and Kentucky – have, in various, mutually inconsistent ways, ordered BellSouth to provide either its federally tariffed wholesale DSL transmission service and/or its retail FastAccess service[6] to CLEC voice customers. Other state commissions have similar issues pending before them. Thus, BellSouth is subject to inconsistent state determinations as to its interstate broadband services, and it is presently attempting to implement the unique requirements of each of these rulings.

Florida. The Florida Public Service Commission has conducted, and continues to conduct, several proceedings concerning the terms and conditions under which BellSouth offers its wholesale and retail broadband services.

In its Final Order on Arbitration, *Petition by Florida Digital Network, Inc. for Arbitration*, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (Fla. Pub. Serv. Comm'n June 5, 2002) ("*FDN Final Order*") (Attachment 3), the Florida commission ordered BellSouth to *continue* to provide FastAccess to existing customers that subsequently choose another company to provide their voice service over UNE loops. Although the Florida commission conceded that, under this Commission's *Computer*

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[5] *See* Order on Arbitration, *Petition of IDS Telcom, LLC for Arbitration*, Docket No. 2001-19-C, Order No. 2001-286, at 28 (S.C. Pub. Serv. Comm'n Apr. 3, 2001) (Attachment 1 hereto) (dismissing as "without merit" the claim that a decision not to provide DSL service over a CLEC's loop "is somehow anticompetitive"); Order and Advisory Opinion Regarding Section 271 Requirements, *Application of BellSouth Telecommunications, Inc. To Provide In-Region, InterLATA Service*, Docket No. P-55, Sub 1022, at 204 (N.C. Utils. Comm'n July 9, 2002) (Attachment 2).

[6] FastAccess is the trade name that BellSouth uses for its retail high-speed DSL Internet access service.

Inquiry orders, it lacked authority to regulate FastAccess, it nevertheless found that it had authority to order this relief because, the Florida commission believed, its decision regulated only local voice service. The Florida commission ultimately detailed multiple terms and conditions implementing its regulation of FastAccess.[7]

The Florida commission imposed similar obligations on BellSouth in the course of the BellSouth-Supra Telecommunications ("Supra") arbitration.[8] BellSouth's challenges to both the Florida Digital Network ("FDN") and Supra decisions are pending in the United States District Court for the Northern District of Florida (Nos. 4:02-CV-325-SM & 4:03-CV-212-RH/WCS).

Additionally, the Florida commission has before it a pending case, Docket No. 020507-TP, involving a complaint filed by the Florida Competitive Carriers Association ("FCCA"). That complaint seeks, in part, to extend the Florida commission's prior rulings to require BellSouth to provide FastAccess to customers that were not receiving

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[7] In particular, the Florida commission specified that: (1) the ruling is limited to FastAccess service and does not apply to xDSL services such as the underlying broadband transmission; (2) any pricing discounts available to customers that purchase the bundle of services including Complete Choice® and FastAccess need not be made available to customers who receive FastAccess only; (3) aside from those exceptions, BellSouth may not generally charge different rates to stand-alone FastAccess customers than it does to BellSouth voice customers; (4) BellSouth can request payment via credit card but, if a customer refuses, it is incumbent on the parties to find an alternative method of payment; (5) BellSouth can discontinue FastAccess service if access to premises is denied to perform rewiring; (6) BellSouth is permitted to contact CLEC customers to ensure that FastAccess service is continued; (7) BellSouth may provide FastAccess service on a separate line if the transition is "seamless"; and (8) BellSouth is not relieved from its obligation to continue to provide FastAccess service if a second facility is not available. *See* Order Resolving Parties' Disputed Language, *Petition by Florida Digital Network, Inc. for Arbitration*, Docket No. 010098-TP, Order No. PSC-03-0395-FOF-TP (Fla. Pub. Serv. Comm'n Mar. 21, 2003) (Attachment 5).

[8] Order on Procedural Motions and Motions for Reconsideration, *Petition by BellSouth Telecommunications, Inc. for Arbitration*, Docket No. 001305-TP, Order No. PSC-02-0878-FOF-TP (Fla. Pub. Serv. Comm'n July 1, 2002) (Attachment 7).

such service when they obtained voice service from a CLEC, but subsequently requested it. The FCCA complaint also seeks to extend the application of the FDN and Supra rulings to all competitive carriers. The Florida commission has held a hearing on this complaint, but has not yet resolved it.

Kentucky. In the context of a section 252 arbitration proceeding between BellSouth and Cinergy Communications Company, the Kentucky Public Service Commission voted 2-1, over the dissent of its chairman, to order BellSouth to provide its wholesale federally tariffed DSL transmission service to Internet service providers ("ISPs") on CLEC UNE voice lines. The Kentucky commission did not, however, require BellSouth to provide its retail FastAccess service over the UNE-P or UNE-L. Copies of the relevant orders of the Kentucky commission are Attachments 8 to 10 hereto. BellSouth has sought federal court review of the Kentucky decision. *See BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, No. 03-23-JMH (E.D. Ky.).

Louisiana. On April 4, 2003, the Louisiana Public Service Commission issued *Clarification Order R-26173-A*,[9] requiring BellSouth to continue to provide its wholesale DSL service and its retail FastAccess service to customers that elect to change their voice service to a competitive carrier utilizing the UNE-P. BellSouth has sought review of the Louisiana commission's decision in federal court, where briefing is underway. *See BellSouth Telecomms., Inc. v. Louisiana Pub. Serv. Comm'n*, No. 03CV372-D-M2 (M.D. La.).

[9] Clarification Order R-26173-A, *BellSouth's Provision of ADSL Service to End-Users over CLEC Loops*, Docket R-26173 (La. Pub. Serv. Comm'n Apr. 4, 2003) ("*Clarification Order R-26173-A*") (Attachment 12).

Georgia. On April 29, 2002, MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (collectively, "WorldCom") filed a complaint before the Georgia Public Service Commission, demanding that the Georgia commission order BellSouth to discontinue its policy of refusing to provide FastAccess service to WorldCom voice customers over the high-frequency portion of their voice lines and to permit WorldCom to provide UNE-P voice service over the same lines BellSouth uses to provide FastAccess service.

On October 21, 2003, the Georgia commission voted 3-2 that BellSouth's policy of offering FastAccess only on BellSouth voice lines was contrary to its interconnection agreement with WorldCom (because it was allegedly discriminatory), as well as in violation of a provision of Georgia law prohibiting anticompetitive practices.[10]

Pending Section 252 Cases. In addition to these decisions, ITC^DeltaCom has filed a petition for arbitration under section 252 of certain unresolved interconnection disputes before the state commissions in Alabama, Tennessee, and Mississippi requesting arbitration of the following issue: "Should BellSouth continue providing the end user ADSL service where ITC^DeltaCom provides UNE-P local service to that same end user on the same line?" Attachment 14 at 17; Attachment 15 at 18; Attachment 16 at 17.

The controversy over this issue is not limited to the BellSouth region. To BellSouth's knowledge, state commissions in Ohio, Michigan, and Illinois have addressed and, to date, rejected requirements akin to those at issue here.[11] Related issues

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[10] *See* Order on Complaint, *Petition of MCImetro Access Transmission Services, LLC et al. for Arbitration*, Docket No. 11901-U (Ga. Pub. Serv. Comm'n Nov. 19, 2003) (Attachment 13).

[11] *See* Arbitration Award, *Petition of MCImetro Access Transmission Services, LLC for Arbitration*, Case No. 01-1319-TP-ARB (Ohio Pub. Utils. Comm'n Nov. 7,

are presently pending before the Maryland Public Service Commission.[12] The issue may well be presented elsewhere as well.

Thus, although this Commission has previously determined, as part of its established federal framework, that BellSouth is not required to provide broadband services to CLEC UNE customers, BellSouth is presently undertaking the costly and burdensome efforts of attempting to comply with these multiple and inconsistent state requirements for provisioning its broadband services.

Analysis

I. STATE COMMISSION DECISIONS REQUIRING BELLSOUTH TO PROVIDE BROADBAND TRANSMISSION AND/OR BROADBAND INTERNET ACCESS ARE CONTRARY TO, AND PREEMPTED BY, THE DECISIONS OF THIS COMMISSION.

This Commission established in the *Triennial Review Order* that states may not impose unbundling obligations that this Commission has considered and rejected. In the same *Triennial Review Order*, the Commission expressly rejected the same obligation that is at issue here and that has been imposed by four state commissions in BellSouth's region. Accordingly, this Commission should expeditiously declare those state commission decisions to be contrary to federal law and preempted.

a. This Commission established a clear preemption rule in the *Triennial Review Order*. It held that, where the Commission has determined that an ILEC need not

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2002) (Attachment 17); Order Denying Rehearing, *Ameritech Michigan's Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996*, Case No. U-12320, at 6 (Mich. Pub. Serv. Comm'n Mar. 29, 2002) (Attachment 18); Phase I Interim Order on Investigation, *Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. 01-0662, at 226 (Ill. Commerce Comm'n Feb. 6, 2003) (Attachment 19).

[12] *See* Complaint of CloseCall America, Inc., Docket No. 8927 (Md. Pub. Serv. Comm'n filed May 2, 2002).

make available a certain facility or functionality on an unbundled basis, that determination of federal law will almost invariably preclude a state commission from reaching a contrary judgment under state or federal law.

The Commission stated that a state agency has no authority to order unbundling of a network element that the Commission has determined "must not be unbundled, in any market, pursuant to federal law." *Triennial Review Order*, 18 FCC Rcd at 17096, ¶ 187. "[S]etting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers." *Id.*

A state commission may not avoid this result by purporting to act under state, rather than federal, law. State commissions are "precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in [the *Triennial Review Order*]." *Id* at 17099-100, ¶ 192 & n.612 (citing, *inter alia*, *Geier v. American Honda Motor Co* , 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause)). Thus, the Telecommunications Act of 1996 ("1996 Act") specifically "prevent[s] states from taking actions under state law that conflict with [the FCC's] framework and create disincentives for investment." *Id.* at 17101, ¶ 196; *see also id.* at 17100, ¶ 193 ("We disagree with those commenters that maintain that, because we have permitted states to add UNEs to our national list in the past, we cannot limit their ability to continue to do so.").

In sum, "[i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus

has found that unbundling that element would conflict with the limits in [47 U.S.C §] 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such [a] decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C)." *Id* at 17101, ¶ 195.

The Commission expressly invited aggrieved parties to file petitions for declaratory ruling such as this one where state commission determinations are contrary to these principles. *See id.*

b. This analysis applies directly here. In the same *Triennial Review Order* in which the Commission established these preemption principles, the Commission addressed the *same issue* that these state commissions have faced in the proceedings discussed above – whether ILECs such as BellSouth should be forced to continue providing DSL-based services on CLEC UNE lines – and it unequivocally determined that ILECs such as BellSouth need not provide DSL transmission (and thus DSL-based Internet access as well) on UNE loops leased to CLECs.

CompTel raised this issue in the *Triennial Review* proceeding. In its comments in that proceeding, CompTel requested that the Commission mandate that ILECs continue to provide DSL-based services over UNE loops that CLECs use for voice service. CompTel argued there that the Commission should require ILECs to offer access to just the "low-frequency portion of the loop" – the portion used for voice service – as a UNE so that the ILECs would be required to continue providing broadband data services over the high-frequency portion of the loop. CompTel argued that this new UNE was necessary to address ILECs' alleged "tying" of voice and data services by refusing to

provide their data services except to their own voice customers. CompTel stated that, "[f]or years, the ILECs have tied their local voice services with their xDSL products. As a result, a customer that wishes to obtain xDSL service from the ILEC while obtaining local voice service from a competing carrier often is rejected by the ILEC."[13]

The Commission rejected CompTel's argument. After expressly noting that many incumbents refuse to provide DSL on CLEC UNE lines, *Triennial Review Order*, 18 FCC Rcd at 17134, ¶ 259, the Commission stated:

> We disagree with CompTel that we should separately unbundle the low frequency portion of the loop, which is the portion of the copper local loop used to transmit voice signals. *We conclude that unbundling the low frequency portion of the loop is not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit a narrowband service-only competitive LEC to take full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer xDSL service.*

Id. at 17141, ¶ 270 (emphasis added; footnote omitted). The Commission thus made it absolutely clear that, "[i]n the event that the customer ceases purchasing voice service from the incumbent LEC, either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service." *Id.* at 17140-41, ¶ 269. This has been a consistent Commission policy since the 1999 *Line Sharing Order*.[14] *See Triennial Review Order*, 18 FCC Rcd at 17140, ¶ 269 n.798 (readopting finding contained in the *Line Sharing Order* that, if a customer switches

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[13] Comments of the Competitive Telecommunications Association, CC Docket Nos. 01-338 *et al.*, at 43 (FCC filed Apr. 5, 2002).

[14] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

voice service from an incumbent LEC to a competitive LEC, "the competitive LEC must purchase the entire loop to continue providing that customer with xDSL service").[15]

The Commission has thus held as a matter of national policy that the low-frequency part of the loop is not a UNE, or, put differently, that ILECs have no obligation to continue to provide DSL services to CLEC UNE voice customers.[16] Because, as discussed above, the *Triennial Review Order* establishes that state commissions cannot countermand such refusals to require a specific unbundling arrangement, that determination is dispositive here.

Although the state commission decisions discussed above use different terminology, they require BellSouth to continue to provide DSL-based services to CLEC UNE voice customers. *See, e.g.*, Order, *Petition of Cinergy Communications Co. for Arbitration*, Case No. 2001-432, at 4 (Ky. Pub. Serv. Comm'n Oct. 15, 2002) (Attachment 9) ("BellSouth may not refuse to provide DSL pursuant to a request from an [ISP] who serves, or who wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P."); *Clarification Order*

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[15] *See also* Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, 9100-01, ¶ 157 & n.562 (2002); Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18517-18, ¶ 330 (2000), *appeal dismissed, AT&T Corp. v. FCC*, No. 00-1295 (D.C. Cir. Mar. 1, 2001); Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, 17 FCC Rcd 17595, 17683, ¶ 164 (2002); Memorandum Opinion and Order, *Application by BellSouth Corporation, et al., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828, 25922, ¶ 178 (2002).

[16] BellSouth does not object to continuing to provide FastAccess on CLEC resold voice lines. Its current policy is to continue to offer service in that context, where BellSouth continues to control the relevant facility.

R-26173-A at 16 ("BellSouth is to continue to provide its wholesale and retail DSL service to customers who choose to switch voice providers to a [CLEC] utilizing the Unbundled Network Element Platform.").[17] That is precisely what the Commission has concluded that ILECs should *not* be required to do.

Preemption is all the more warranted here because the Commission's decision not to require this particular arrangement was grounded in the core policies that preclude unbundling where impairment does not exist: the need to preserve incentives to engage in facilities-based competition. As the Commission explained in the *Triennial Review Order*, in determining whether to mandate unbundling, it must balance the "market barriers faced by new entrants," as well as the "societal costs" of sharing, with the goal of "ensur[ing] that investment in telecommunications infrastructure will generate substantial, long-term benefits for all consumers." 18 FCC Rcd at 16984-85, ¶ 5. Part of that task involves the recognition that "excessive" sharing requirements "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." *Id.* at 16984, ¶ 3.

In this context, the Commission concluded that the right incentives to invest in and deploy new technologies – to engage in facilities-based competition – are created

[17] The Florida commission's *FDN* decision permits BellSouth to provide service on a stand-alone loop in some circumstances. Such a decision is equally contrary to the Commission's rationale, which applies by its terms to any obligation on the part of ILECs to provide DSL service to a CLEC voice-service customer – whether by entering into an arrangement to "share" a line with a CLEC or by offering DSL service over a stand-alone loop. The Commission recognized that, once a CLEC has access to the loop, there is no obstacle to its providing *both* voice and DSL (data) service – either independently or in conjunction with another provider. *See Triennial Review Order*, 18 FCC Rcd at 17135, ¶ 261, 17141, ¶ 270. Under these circumstances, requiring the ILEC to continue to provide one kind of service in conjunction with a CLEC providing the other would impair the pro-competitive, consumer-welfare-enhancing incentive for competitors to develop voice-and-data arrangements that compete in *both* respects with the incumbent. *Id.*

when a CLEC cannot rely on the ILEC to provide data (or voice) services to CLEC UNE customers. Instead, CLECs should be encouraged to exploit both the voice and data capabilities of a UNE loop. The Commission explained that "readopting [its] line sharing rules on a permanent basis would likely discourage innovative [line-splitting] arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." *Id.* at 17135, ¶ 261.

The same analysis applies here, where CLECs, instead of relying on ILEC data services, can engage in innovative line-splitting arrangements to provide voice and data services and thus create "greater product differentiation" between ILEC and CLEC offerings. Indeed, Covad has recently announced broad agreements with AT&T and MCI to do just that. Covad's agreement with MCI provides MCI "with access to Covad's nationwide network, which covers more than 1,800 central offices serving more than 40 million homes and businesses in 35 states."[18] AT&T's deal with Covad similarly anticipates a "nationwide rollout of DSL service that can be packaged as part of an AT&T local and long-distance communications bundle. . . . The new offer, which utilizes a nationwide data network provided by Covad Communications, enables consumers to bundle AT&T's DSL service with other AT&T local and long-distance services."[19]

It is such voluntary agreements that this Commission's *Triennial Review Order* is designed to encourage. By contrast, the types of regulatory mandates here are contrary to

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[18] *Wireline*, Comm. Daily, Sept. 3, 2003, at 5.

[19] *AT&T Launches Bundled DSL Services in Four New States*, Espicom Bus. Intelligence (Sept. 12, 2003).

the express judgment of the Commission. These state commission broadband decisions undermine the federal incentives for CLECs to provision their own broadband services or engage in innovative line splitting arrangements in direct conflict with the Commission's established federal framework. They are thus preempted. *See Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 196 ("We find that our federal framework . . . offers the certainty and stability necessary to enable parties to make investment decisions. . . . [W]e find that the limitations embodied in section 251(d)(3)(B) and (C) will prevent states from taking actions under state law that conflict with our framework and create disincentives for investment.").

II. STATE PUBLIC SERVICE COMMISSIONS LACK AUTHORITY TO REGULATE BROADBAND INTERNET ACCESS SERVICES.

A. This Commission Has Established As Federal Policy That Interstate Information Services Should Be Unregulated.

This Commission's long-established policy is that interstate information services must remain *unregulated* The origins of this federal "hands off" policy with respect to information services can be traced back at least 30 years through the Commission's several *Computer Inquiry* proceedings. Beginning with its landmark *Computer I* decision in 1971, the Commission has consistently determined that what was then known as "data processing" was a highly competitive industry not in need of regulation. The Commission therefore resolved *not* to regulate "data processing services as such." Final Decision and Order, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267, 268, ¶ 4 (1971) ("*Computer I*").

Computer I led to some confusion as to when computer-processing activity should be deemed "data processing" rather than communications. To resolve this issue, in its 1980 *Computer II* decision, the Commission deregulated the provision of *all* computer-enhanced services (as well as the computers themselves and other customer premises equipment, or "CPE"). *See* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 428, ¶ 114, 447, ¶ 160 (1980) ("*Computer II*"). There thus arose a fundamental distinction between "basic" services subject to regulation and deregulated "enhanced" services (known as "information services" under the 1996 Act[20]). *See* 77 F.C.C.2d at 428, ¶ 114 ("we are left with two categories of services – basic and enhanced"). The Commission made very clear its determination that the market for enhanced services must remain unregulated to create maximum consumer benefit. It explained that "***the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network.***" *Id.* at 387, ¶ 7 (emphasis added).

Furthermore, the FCC said, "[e]xperience gained from the competitive evolution of varied market applications of computer technology offered since the *First Computer Inquiry* compels us to conclude that the *regulation of enhanced services is simply unwarranted.*" *Id.* at 433, ¶ 128 (emphasis added). This was so because, among other things, the enhanced services market was already "truly competitive." *Id.* at 428,

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[20] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21955-56, ¶ 102 (1996) ("all of the services . . . previously considered to be 'enhanced services' are 'information services'").

¶¶ 113-114, 430, ¶ 119, 433, ¶ 128. Moreover, "[i]nherent in the offering of enhanced services is the ability of service providers to custom tailor their offerings to the particularized needs of their individual customers," so that "to subject enhanced services to a common carrier scheme of regulation . . . would negate the dynamics of computer technology in this area." *Id.* at 431-32, ¶ 123.

Although declining to regulate enhanced services itself, the Commission retained jurisdiction over such services, preempting any attempts by state or local authorities to impose inconsistent regulations of their own. *E.g.*, *id.* at 432, ¶ 125 ("[W]e find that the enhanced services under consideration in this proceeding . . . fall within the subject matter jurisdiction of this Commission."); Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512, 541, ¶ 83 n.34 (1981) ("In this proceeding we have to date preempted the states . . . . States, therefore, may not impose common carrier tariff regulation on a carrier's provision of enhanced services.").

Thus, there can be no serious dispute that the Commission has precluded state regulation of interstate information services. As the Commission has stated, a "major goal [that the Commission] sought to achieve in the *Computer II* decisions was to prevent uncertainty regarding the provision of competitive CPE and enhanced services which could arise if there were a threat that *regulation by this or other agencies* might inhibit unregulated providers or create impediments to innovation by carriers and others." Report and Order, *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, 1126, ¶ 18 (1983) (emphasis added).

The D.C. Circuit upheld the Commission's exercise of preemptive authority. The court explained that, "[f]or the federal program of deregulation to work, *state regulation of . . enhanced services has to be circumscribed.*" *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982) (emphasis added); *see also id.* at 214 (preemption of state regulation is "justified . . . because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE"). Accordingly, that court held, "state regulatory power must yield to the federal." *Id.* at 216.

Subsequent Commission orders likewise recognized that state regulation of interstate information services would interfere with federal policies. For instance, in its initial *Computer III* decision, the FCC reaffirmed its preemption of state regulation of enhanced services. *See* Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 1127, ¶ 347 (1986) ("*Computer III*") ("we do not alter our conclusion in *Computer II* that such [enhanced] services must remain free of state and federal regulation"). Although the Ninth Circuit questioned that policy as to purely intrastate service,[21] there is no doubt that the FCC may lawfully preempt state commission decisions as to interstate (and jurisdictionally mixed) information services that undermine or impede the federal policy that "the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network." 77 F.C.C.2d. at 387, ¶ 7.

[21] *See California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990).

B. The Commission and the Federal Courts Have Previously Preempted State Commission Decisions That Undermined Federal Policy As to Enhanced Services.

The Commission has previously exercised its authority expressly to preempt state commission decisions that are incompatible with the federal policy of deregulation of enhanced/information services. In particular, in the *Memory Call Order*,[22] the Commission preempted the Georgia commission's attempt to regulate an enhanced service (voice mail) because it "displace[d]" the "federal public interest determination" as to treatment of enhanced services. 7 FCC Rcd at 1623, ¶ 20.

The Commission first determined that the Georgia commission's decision regulated interstate uses of voice mail, *see id* at 1621, ¶ 12, and that it was not practical to offer separate interstate and intrastate voice mail, *see id.* at 1621-22, ¶¶ 13-16. The Commission then decided that the state regulation (which "froze" BellSouth's ability to offer voice mail) was preempted because it "thwart[ed] achievement of the federal public interest objective[]" of allowing "BOCs to make use of their substantial telecommunications resources to provide interstate enhanced services to the public." *Id.* at 1623, ¶¶ 20, 22.

Applying a similar analysis, a federal district court in Minnesota recently concluded that a state commission lacks authority to regulate information services. In *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, No. 03-5287, 2003 U.S. Dist. LEXIS 18451 (D. Minn. Oct. 16, 2003), the Minnesota district court enjoined the Minnesota Public Utilities Commission from regulating an information service, ruling

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[22] Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992) ("*Memory Call Order*").

that federal law preempted such state regulation. As the Commission is aware, at issue in *Vonage* was an Internet-based technology used to provide voice communications via a high-speed Internet connection (*i.e* , "IP telephony"). *See id* at *3.[23]

Citing this Commission's *Computer Inquiry* decisions, as well as the 1996 Act (which codifies the distinction between regulated telecommunications services and unregulated enhanced/information services), the court ruled that the Minnesota commission had no authority to impose requirements on this information service. The court held that, to the extent that Minnesota regulations had the effect of regulating information services, they were "in conflict with federal law and must be pre-empted." *Id.* at *25, *27. "[IP telephony] services necessarily are information services, and *state regulation over [such] services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated.*" *Id.* at *27 (emphasis added). In addition, the court held that Congress had expressed an "intent to occupy the field of regulation of information services," *id.* at *27-*28, such that the Minnesota commission's order was preempted as an "obstacle to the 'accomplishment and execution of the full objectives of Congress,'" *id.* at *29 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986)).

[23] BellSouth does not cite this decision in support of the proposition that IP telephony is in fact an information service, an issue that is not relevant here and as to which BellSouth does not take a position in this filing. Rather, this decision is important because it demonstrates that, for services that do qualify as information services, state commission jurisdiction is preempted.

C. The Commission's Orders Compel the Conclusion That State Commission Decisions Purporting To Require That BellSouth Offer FastAccess to Particular Customers on Particular Terms and Conditions Are Preempted.

This Commission's prior decisions compel the conclusion that state commission orders (such as those in Florida, Louisiana, and Georgia) that attempt to dictate the terms and conditions of BellSouth's broadband Internet access services are preempted.

As an initial matter, FastAccess is an information service under 47 U.S.C. § 153(20). This Commission has determined that "Internet access services" are generally "appropriately classed as information, rather than telecommunications, services," and has tentatively reached that same conclusion with respect to BOCs.[24] Moreover, the recent Ninth Circuit decision confirms that cable-based Internet access services are information services; it merely suggests (wrongly, in BellSouth's view) that these Internet access services may also include a telecommunications service.[25] To the extent that is true in the wireline context, that telecommunications service is the wholesale DSL transmission service that BellSouth separately makes available under federal tariff, and which BellSouth does not claim is covered by this Commission's preemption of state regulation of enhanced/information services.

Moreover, these state decisions are not limited to intrastate communications. As this Commission has held, Internet communications are predominately interstate. *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for*

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[24] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11536, ¶ 73 (1998); *see* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3030, ¶ 20 (2002).

[25] *See Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

ISP-Bound Traffic, 16 FCC Rcd 9151, 9175, ¶ 52 (2001) ("ISP traffic is properly classified as interstate, and it falls under the Commission's section 201 jurisdiction.") (footnote omitted), *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003); Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22476, ¶ 19 (1998) ("*GTE Tariff Order*") (concluding that Internet access is interstate because "the communications at issue here do not terminate at the ISP's local server . . . but continue to the ultimate destination or destinations, very often at a distant Internet website"). As with voice mail, BellSouth does not market, and no consumer would buy, a separate, wholly intrastate Internet access product.

Finally, state commission decisions that purport to require BellSouth to provide service to consumers that BellSouth would not choose to serve and, moreover, to set the terms under which BellSouth offers that service thwart the Commission's policy that "the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network." *Computer II*, 77 F.C.C.2d. at 387, ¶ 7. Instead of having market forces determine whether BellSouth will choose to offer FastAccess to a particular customer, states are purporting to tell BellSouth to whom it must offer its services (*i.e.*, CLEC UNE voice customers) and on what terms (*e g* , with only a minimal disruption, at the same rate as BellSouth voice customers, etc.). Those are the very forms of public-utility regulation that this Commission and the states impose on telecommunications services, but that, under this Commission's decisions (as well as court decisions such as *Vonage*), are unlawful as to information services. As in *Memory Call*, this Commission should

clear away any possible confusion on this issue and declare that obligations to provide DSL-based Internet access to any particular customers or on any particular terms are unlawful and preempted.

Indeed, the states' lack of authority to impose such regulations on interstate information services such as FastAccess is so plain that, in the decisions to date, they have not even contested that proposition. The Florida commission, for instance, has conceded that BellSouth's FastAccess service is not subject to regulation. Citing this Commission's *Computer II* decision, the state commission expressly "*agree[d]*" with BellSouth that it is an "enhanced, *nonregulated*, nontelecommunications Internet access service." *FDN Final Order* at 8 & n.3 (emphases added; internal quotation marks omitted). The Florida commission thus tried to justify its decision on the ground that it was *not* in fact regulating FastAccess. It stated that its decision "should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service," and in fact was simply exercising authority over the local voice market. *Id.* at 8, 11.

That is a transparent dodge. Under any rational understanding, a state commission decision that requires BellSouth to continue offering a service regulates that service. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421-22 (5th Cir. 1999) (Commission rules preventing the disconnection of intrastate service for failure to pay toll charges was a "regulation" of the intrastate service because "it dictate[d] the circumstances under which local service must be maintained'). The state commissions' attempt to characterize this regulation as something else does not change the result.

III. STATE COMMISSIONS LACK AUTHORITY TO REGULATE INTERSTATE COMMUNICATIONS.

Separate and apart from these other barriers to state regulation, state commission decisions of the sort at issue here are unlawful because this Commission has exclusive authority to regulate interstate telecommunications.[26] Multiple court cases confirm that authority.[27]

Of particular relevance here, the Commission has concluded that wholesale DSL transmission service, when used for Internet access, is jurisdictionally interstate under the 10% rule applicable to such special access services. *See GTE Tariff Order*, 13 FCC Rcd at 22476, ¶ 19. The Commission thus concluded that DSL transmission for Internet access is an interstate "special access service . . . warranting *federal* regulation" and, in particular, federal tariffing. *Id.* at 22480, ¶ 25 (emphasis added). Indeed, because the Commission determined that DSL transmission service is subject to federal, not state, jurisdiction under the 10% rule, it was unnecessary for the Commission to consider arguments whether state regulation was preempted on any other ground: "In light of our

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[26] *See* 47 U.S.C. § 151 (creating FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio"); Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C.2d 241, 261, ¶ 58 (1983) ("the state[] would not acquire jurisdiction to regulate . . . interstate access even if [the FCC] were abolished"), *aff'd in relevant part, remanded in part, NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); Memorandum Opinion and Order, *Petitions of MCI Telecomms. & GTE Sprint*, 1 FCC Rcd 270, 275, ¶ 23 (1986) (stressing the Commission's "exclusive jurisdiction over interstate communications").

[27] *See Crockett Tel. Co. v FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) (Commission has "exclusive jurisdiction to regulate interstate common carrier services"); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930) ("neither these interstate rates nor the division of the revenue arising from interstate rates [is] a matter for the determination [of the state]"); *NARUC v. FCC*, 737 F.2d 1095, 1111 (D.C. Cir. 1984) (limitation on state authority over interstate services "is essential to the appropriate recognition of the competent governmental authority in each field of regulation") (internal quotation marks omitted); *New England Tel. & Tel. Co. v. AT&T*, 623 F. Supp. 1231, 1234 (D. Me. 1985) ("It is well settled that the FCC has exclusive jurisdiction over . . . interstate service.").

finding that GTE's ADSL service is subject to *federal jurisdiction* under the Commission's mixed use facilities rule and properly tariffed as an interstate service, we need not reach the question of whether the inseverability doctrine applies." *Id.* at 22481, ¶ 28 (emphasis added).

This Commission's determination that it has jurisdiction over DSL transmission services as used for Internet access and that these services should be subject to federal tariffing creates a barrier to state decisions that seek to impose terms and conditions either on (1) wholesale tariffed DSL services (as in Kentucky) or (2) as to BellSouth's retail DSL-based Internet access service, as to which wholesale DSL transmission is an input. *See* 47 C.F.R. § 64.901(b)(1) (requiring BOCs to apply to themselves the same terms and conditions for the transmission component of an information service as they make available to other carriers under tariff).

As federal courts have repeatedly held, state commissions have no authority to regulate the terms and conditions of services offered under a federal tariff; indeed, if they did, that would undermine the uniformity that a federal tariff is intended to create.[28] If

[28] *See Public Serv. Co. v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998) ("[T]he Supreme Court has ruled that where the FERC has lawfully determined a rate, allocation, or other matter, a state commission cannot take action that contradicts that federal determination. And even without explicit federal approval of a rate, the Court has treated a rate reflected in a FERC tariff as setting a rate level binding on a state commission in regulating the costs of the purchasing utility.") (citing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74 (1988)); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-66 (1986); *see also Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 491 (2d Cir. 1968) ("The published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements."); *Appalachian Power Co. v. Public Serv. Comm'n*, 812 F.2d 898, 904 (4th Cir. 1987) ("states are powerless to exert authority that potentially conflicts with FERC determinations regarding rates or agreements affecting rates"); *Duke Energy Trading & Mktg, L.L.C. v. Davis*, 267 F.3d 1042, 1056 (9th Cir. 2001) (terms and conditions in federally approved rate schedules and tariffs "preempt conflicting regulations adopted by

BellSouth must provide its federally tariffed service under one set of conditions in Kentucky (where the state commission has required that BellSouth provide it over CLEC UNE lines) and a different set of terms in South Carolina (where the state commission has refused to impose such an obligation), there will be no single federally tariffed service, but rather a multitude of different services depending on the judgment of different state commissions. That is unlawful. As the Second Circuit has explained, "[t]he published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements."[29] Accordingly, the relevant rule is that, as Judge Posner has explained, state law cannot be used to vary a federally tariffed service: "Federal law does not merely create a right; it occupies the whole field, displacing state law."[30] For these reasons, two federal courts have held this year that state commissions are prohibited from regulating federally tariffed, federally regulated, interstate special access services.[31]

Likewise, some state commissions have affirmatively acknowledged that they lack authority to regulate federally tariffed services because that would entail an unlawful

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the States"), *cert. denied*, 535 U.S. 1112 (2002); *Entergy La., Inc. v. Louisiana Pub. Serv. Comm'n*, 123 S. Ct. 2050, 2053, 2056 (2003).

[29] *Ivy Broad. Co.*, 391 F.2d at 491.

[30] *Cahnmann v. Sprint Corp* , 133 F.3d 484, 488-89 (7th Cir. 1998); *see AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) (filed tariff determines terms and conditions as well as rates, and neither may be altered).

[31] *See Qwest Corp. v. Scott*, No. 02-3563, 2003 WL 79054, at *10 (D. Minn. Jan. 8, 2003) (state regulation was expressly preempted because this Commission had "determined that mixed-use special access is to be classified as interstate unless it contains 10% or less interstate traffic"); *Illinois Bell Tel. Co. v. Globalcom, Inc.*, No. 03 C 0127, 2003 WL 21031964, at *2 (N.D. Ill. May 6, 2003) (holding that state commission lacked jurisdiction to invalidate federal tariff's early termination charge because the special access service at issue was "*assigned to the FCC's jurisdiction under federal tariffs*") (emphasis added).

modification of the terms and conditions of a federal tariff. The Massachusetts Department of Telecommunications and Energy, for instance, rejected a CLEC request to regulate interstate special access performance because, as it explained, "[i]n order for [it] to regulate the quality of federally tariffed special access services, [it] would need a delegation of authority from the FCC."[32] The Massachusetts commission further explained that it could not grant a request to regulate interstate special access "because to do so would be inconsistent with the FCC's exclusive jurisdiction over the quality of service of federally tariffed special access services. The Department concludes that it is pre-empted from investigating and regulating quality of service for federally tariffed special access services."[33] Similarly, the New York Public Service Commission decided to seek a delegation of authority from this Commission because it lacked independent authority to regulate interstate special access.[34]

This same analysis applies in the present case as well. Because DSL, a form of interstate special access, is subject to the exclusive authority of this Commission, it cannot be regulated by the states.

Indeed, state commission decisions that require BellSouth to provide DSL over CLEC UNE loops are unlawful for the additional reason that they not only add a term or condition to BellSouth's federally tariffed service, but also affirmatively contradict

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[32] Order on AT&T Motion to Expand Investigation, *Investigation by the Department of Telecommunications and Energy on Its Own Motion Pursuant to G.L. c. 159, §§ 12 & 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services*, D.T.E. 01-34, 2001 Mass. PUC LEXIS 94, at *16 (Mass. D.T.E. Aug. 9, 2001).

[33] *Id.* at *18-*19.

[34] *See* New York Pub. Serv. Comm'n Press Release, *PSC Strengthens Verizon's Service Quality Standards for "Special Services"* (May 23, 2001) (describing letter requesting FCC delegation of authority).

BellSouth's filed tariff. BellSouth's DSL tariff specifies that the "designated end-user premises location" must be "served" by an "existing, in-service, Telephone Company provided exchange line facility." BellSouth Tariff F.C.C. No. 1, § 7.2.17(A). "Telephone Company" is a defined term in the tariff and it refers to BellSouth.[35] When a CLEC provides voice service to a customer using an unbundled loop, that customer is not being served by a "BellSouth-provided" exchange line facility. Indeed, this Commission has specifically determined that, when a CLEC leases a loop, it, *not* the incumbent carrier, controls that facility, and has the exclusive right to use it. *See* 47 C.F.R. § 51.309; First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 15635, ¶ 268 (1996) ("[A] telecommunications carrier purchasing access to an unbundled network facility is entitled to *exclusive* use of that facility.") (emphasis added) (subsequent history omitted). BellSouth cannot be "providing" a facility that it does not control and that another party has the exclusive right to use.

IV. THE COMMISSION HAS BROAD POWER TO ISSUE THE REQUESTED DECLARATORY RULING.

This Commission is authorized to issue declaratory rulings under section 1.2 of its General Rules of Practice and Procedure: "The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. While it is not necessary for a petitioner to show a "case or controversy in the judicial

[35] *See* BellSouth Tariff F.C.C. No. 1, § 1.1 (Dec. 16, 1996).

sense" in order to obtain declaratory relief from the Commission,[36] there must be a showing of a "genuine controversy or uncertainty [that] requires clarification."[37] The Commission has "broad and discretionary powers" to issue declaratory relief.[38]

The purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists.[39] The Commission has previously held that declaratory relief was especially appropriate to address uncertainty and confusion caused by a communications company having to comply with state regulatory decisions that were contrary to prior FCC decisions. *See Telerent*, 45 F.C.C.2d at 214, ¶ 22, 220, ¶ 38 ("We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection as a result of these State actions."; "No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication . . . .").

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[36] Memorandum Opinion and Order, *Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission*, 93 F.C.C.2d 1287, 1290, ¶ 9 (1983) (internal quotation marks omitted).

[37] Memorandum Opinion and Order, *BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Building Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises*, 6 FCC Rcd 3336, 3342-43, ¶ 27 (1991).

[38] Memorandum Opinion and Order, *Telerent Leasing Corp. et al. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C.2d 204, 213, ¶ 21 (1974) ("*Telerent*").

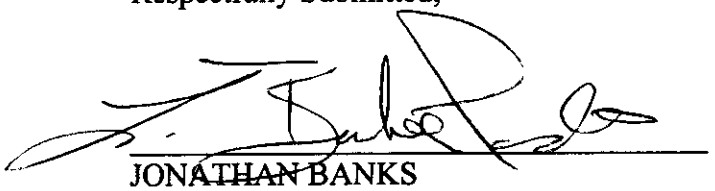
[39] *See* Memorandum Opinion and Order, *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations*, 92 F.C.C.2d 864, 879, ¶ 43 (1983).

Thus, this Commission has every right and reason to preempt any state commission determination that attempts to regulate the rates, terms, or conditions of any ILEC-provided broadband Internet access service.

Conclusion

For all of the reasons discussed herein, BellSouth urgently requests that the Commission issue a declaratory ruling specifying that (1) state commission decisions requiring ILECs to provide broadband Internet access to CLEC UNE voice customers are contrary to the *Triennial Review Order* and thus preempted; (2) state commission decisions requiring the provision of broadband Internet access to CLEC UNE voice customers impose regulation on interstate information services in contravention of this Commission's orders; and (3) state commission decisions specifying the terms and conditions under which ILECs provide federally tariffed broadband transmission either on its own or as part of a broadband information service intrude on this Commission's exclusive authority over interstate telecommunications and are thus preempted.

Respectfully Submitted,



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